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Supreme Court of the United States

OCTOBER TERM, 1962

No. 249

SUN OIL COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

REPLY BRIEF OF PETITIONER SUN OIL COMPANY

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Pursuant to Rule 24(4) of this Honorable Court, Petitioner, Sun Oil Company, submits its reply brief to the brief for the Federal Power Commission (Respondent) in opposition.

PRELIMINARY STATEMENT

As set forth in more detail in the petition for a writ of certiorari, the orders of which review are sought in this proceeding declare inoperative and of no effect at law all flexible pricing provisions, except those specifically exempted therein, in contracts executed by independent producers on or after April 3, 1961, for the sale or transportation of natural gas in interstate commerce, subject to the jurisdiction of the Respondent. In such petition it was further pointed out that the orders thus deprive Petitioner of the rights to negotiate contracts containing most types of flexible pricing provisions heretofore found valid and enforced by

the Courts, which this Court's *Mobile*[1] and *Memphis*[2] decisions clearly hold Petitioner and all independent producers have a right to negotiate.

The petition also pointed out that the orders deprive Petitioner of the right to make rate filings based on such proscribed flexible pricing provisions and to have them reviewed pursuant to the Commission's authority to review rates under Sections 4 and 5 of the Natural Gas Act. Additionally, the orders effectively deprive Petitioner of the right to propose in a certificate proceeding under Section 7 of the Natural Gas Act the conditions under which its natural gas will be committed to the interstate market as Petitioner believes this Court's *CATCO* case[3] held it had a right to do. Moreover, Petitioner also pointed out in its petition that the orders exceed the Commission's rule-making powers under Section 16 of the Natural Gas Act.

In the brief for Respondent in opposition it is asserted that the petition should be denied because the orders of which review is sought promulgated rules of general applicability, the orders were not issued in a proceeding of an adjudicatory nature and thus are not reviewable under Section 19(b) of the Act, and it is argued that this Court's *Columbia Broadcasting System*[4] and *Storer*[5] decisions particularly relied on in the petition for a writ of certiorari are not applicable.

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[1] *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

[2] *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958).

[3] *Atlantic Refining Co. v. Public Service Commission of the State of New York*, 360 U.S. 378 (1959).

[4] *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407 (1942).

[5] *United States v. Storer Broadcasting Company*, 351 U.S. 192 (1956).

ARGUMENT

1. In the petition for a writ of certiorari several decisions of this Court, including the *Columbia Broadcasting System* and *Storer* decisions, *supra*, reviewing orders of general applicability were cited (Pet. p. 13). The Court of Appeals for the District of Columbia Circuit in *Philadelphia Co. v. Securities & Exchange Commission*, 164 F. 2d 889 (1947), *certiorari denied*, 333 U.S. 828,[6] specifically pointed out that rules or regulations of general applicability were reviewable when their impact applies specifically and affects or determines the right of a particular person. In that case, the Court stated:

> "* * * But not even the fact that the action of an administrative agency is phrased to apply generally, or may indeed have general application, is necessarily conclusive that its action is not subject to review as an 'order' under the Urgent Deficiencies Act as extended by the Communications Act, or under Section 24(a) of the Holding Company Act. If in its impact a 'rule or regulation' applies specifically and affects or determines the rights of a particular person or corporation, then the action of the agency in promulgating it is reviewable even though the 'rule or regulation' is not directed in terms to any particular person or corporation. This is evidenced by the ruling of the Supreme Court in the Columbia System case just cited * * *" [82 App. D.C. at 346, 164 F. 2d at 900].

As to the impact of the orders on Petitioner and others, the petition for a writ of certiorari pointed out that in this Court's *Columbia Broadcasting System* case, *supra*, regulations were reviewed which purport

[6] For the subsequent history of this case see 175 F. 2d 809 (1948); *vacated* (on joint motion) per curiam 337 U.S. 901 (1949).

to operate to alter and affect adversely present contractual rights and business relations as do the rules promulgated by the orders under review. It was also pointed out that in this Court's *Storer* decision, *supra*, this Court considered the effect of the rules of general applicability reviewed in that case on future business affairs[7] (Pet. pp. 13-14). Additionally, it seems appropriate to point out that the United States Court of Appeals for the Tenth Circuit in *Keeler* v. *Commissioner of Internal Revenue*, 180 F. 2d 707 (1950) stated that actions which adversely affect legal rights or operate adversely on property rights constitute aggrievement as do the orders under review, when the Court stated:

> "* * * The rule that only a party aggrieved by a decision may appeal is recognized, but to be aggrieved it is not necessary that there be an actual pecuniary loss. The proper test is whether the decision invades the legal rights of a person or operates adversely on his property rights and interests" [180 F. 2d at 709].

The Tenth Circuit in *Phillips Petroleum Company* v. *Federal Power Commission*, 227 F. 2d 470 (1955), *certiorari denied, sub nom. Michigan Wisconsin Pipe Line Company* v. *Phillips Petroleum Company*, 350 U.S. 1005 (1956), citing decision of the Fourth Cir-

[7] As the brief for Respondent points out, the Court also considered the dangers to Storer's existing licenses that could result by reason of persons not subject to Storer's control acquiring stock (Br. in Opp. p. 13, fn. 7). However, this Court also found that: "These [the effects of the regulations on (1) future business affairs prohibiting enlargement of the number of stations and (2) danger to Storer's existing licenses] are grievances presently restricting Storer's operations" (351 U.S. at 200). Thus, it definitely appears this Court considered either effect to constitute aggrievement, and reviewability in that case did not, it is submitted, depend on the danger that could result to Storer's existing licenses.

cuit and the First Circuit[9] held that "* * * reviewability extends to an order issued by the Commission which finally determines the legal rights of the parties with respect to matters within the scope of review" [227 F. 2d at 474].[10] There can be no question that the orders here under review purport to determine with finality the legal rights of Petitioner to enter into contracts containing flexible pricing provisions and adversely to affect other rights as described in the preliminary statement above.

Prior to the date the orders under review were promulgated, the flexible pricing provisions proscribed by these orders were valid and legal for all purposes in connection with the transportation and sale of natural gas subject to the Commission's jurisdiction.[11] The rejection of two contracts containing proscribed provisions as set forth in the brief for Respondent (Fn. 8, p. 14) clearly signifies that under the Respondent's orders a contract containing a proscribed pricing provision is at most a condition precedent to test the validity of Respondent's orders. As most sales are from multi-ownership fields, the advent of drainage unless sales are promptly authorized, and the attendant loss

[9] *Atlantic Seaboard Corp.* v. *Federal Power Commission*, 201 F. 2d 568 (4th Cir. 1953).

[9] *Algonquin Gas Transmission Co.* v. *Federal Power Commission*, 201 F. 2d 334 (1st Cir. 1953).

[10] See also, *Cities Service Gas Company* v. *Federal Power Commission*, 255 F. 2d 860 (10th Cir. 1958), *cert. denied, sub nom. Magnolia Petroleum Company* v. *Cities Service Gas Company*, 358 U.S. 837 (1958); and *Sun Oil Company* v. *Federal Power Commission*, 266 F. 2d 222 (5th Cir. 1959), *affirmed* 364 U.S. 170 (1960).

[11] Cf. *Texas Gas Transmission Corporation* v. *Shell Oil Company*, 363 U.S. 263 (1960).

of leases, would even prevent Court review of the validity of the regulations in substantially all cases. Except in rare instances, in Petitioner's view, no pipeline company would be willing to negotiate a contract which could not in any event become valid under the orders involved until the authority of the Commission to promulgate the rules involved had been determined by the Courts. Thus, even to suggest that the orders have no immediate adverse impact on Petitioner and others completely ignores realities.

2. The contentions in the brief on behalf of Respondent (Br. in Opp. pp. 9-10) that Section 19(b) of the Act only authorizes review of orders issued in proceedings of an adjudicatory nature appear to be predicated on the language of this Court's decision in *Metropolitan Edison*[12] that Section 19(b) only contemplates review of orders issued in a proceeding in which the Commission has taken evidence and made findings. However, since that case was decided, there have been numerous cases[13] in which orders of Respondent, entered without hearing and findings based thereon have been reviewed

[12] *Federal Power Commission* v. *Metropolitan Edison Company*, 304 U.S. 375 (1938).

[13] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958); *Cities Service Gas Company* v. *Federal Power Commissoin*, 255 F. 2d 860 (10th Cir. 1958); *cert. denied* 358 U.S. 837 (1958); *Phillips Petroleum Company* v. *Federal Power Commission*, 227 F. 2d 470 (10th Cir. 1955); *cert. denied* 350 U.S. 1005 (1956); *Algonquin Gas Transmission Co.* v. *Federal Power Commission*, 201 F. 2d 334 (1st Cir. 1953); *Sunray Mid-Continent Oil Company* v. *Federal Powe. Commission*, 270 F. 2d 404 (10th Cir. 1959); *The Pure Oil Company* v. *Federal Power Commission*, 292 F. 2d 350 (7th Cir. 1961); *J. M. Huber Corporation* v. *Federal Power Commission*, 294 F. 2d 568 (3rd Cir. 1961).

by the Courts, including review by this Court of the letter orders involved in *Sun Oil Company* v. *Federal Power Commission*, 364 U.S. 170 (1960). In that case, as here, Respondent in the Court below contended that the orders entered without a hearing were not reviewable, *Sun Oil Company* v. *Federal Power Commission*, 266 F. 2d 222, 226 (5th Cir. 1959). There can be no question that the orders here involved were final agency action in a completed rule-making proceeding as were the orders reviewed in the *Storer* case, *supra*, (351 U.S. at 198). Moreover, Petitioner was a party to the proceedings (R. 93; J.A. 41)[14] and filed timely applications for rehearing (R. 65-78; J.A. 13-26; R. 84-91; J.A. 32-39). Clearly, under the foregoing precedents and circumstances, the issuance of the orders without notice and opportunity for hearing, as it is asserted in the brief for Respondent that Respondent was authorized to do, did not render the orders which promulgated the rules immune from review under Section 19(b) of the Act.

3. The brief for Respondent also argues that Petitioner's reliance on this Court's *Columbia Broadcasting System* and *Storer* decisions is misplaced, because in those cases rules of general applicability were reviewed under statutes unlike Section 19(b) which is limited to review of proceedings of an adjudicatory nature. It is shown in the preceding section that review under Section 19(b) is not so limited. In the petition for a writ of certiorari it was pointed out that the provisions of The Judicial Review Act under which

[14] Record references are to the transcript of record prepared by the Clerk of the United States Court of Appeals for the Fifth Circuit. Pages 51 through 94 of such record consist of the joint appendix filed with the Court of Appeals and references thereto are also included when applicable.

the *Storer* case was reviewed appears similar in all material respects to Section 19(b). The assertion in the brief in opposition (p. 13, fn. 6) that the "* * * change in review court was not intended to affect the prior law on the nature of orders reviewable under Section 402(a) [of the Communications Act]" would also indicate that after the change in the statute orders of general applicability formerly reviewable under the Urgent Deficiencies Act are now reviewable under a statute similar to Section 19(b) of the Natural Gas Act [i.e., Sections 2 and 4 of The Judicial Review Act] and, thus, orders of general applicability are reviewable under Section 19(b). In the *Philadelphia* case, *supra*, the Court of Appeals for the District of Columbia Circuit stated that no distinction could be drawn with respect to the nature of the statutory route for review of the order of general applicability in that case, i.e., Section 24(a) of the Holding Company Act which appears similar in all material respects to Section 19(b) of the Natural Gas Act,[15] and the Urgent Deficiencies Act, as extended by Section 402(a) of the Communications Act:

> "We think no proper distinction can be drawn between the Rochester Telephone case and the instant case because in the former the review sought was before a three-judge court under the Urgent Deficiencies Act, as extended by Section 402(a) of the Communications Act of 1934, and in the instant case under Section 24(a) of the Holding Company Act. It is not the nature of the judicial tribunal nor of the statutory route thereto which determines the reviewability of an order of an administrative agency. The test lies in the two

[15] The differences between Section 24(a) and Section 19(b), e.g., such as persons or party aggrieved may seek review and an application for rehearing is not a prerequisite for review, are not material as far as this proceeding is concerned.

requisites of primary jurisdiction and administrative finality laid down and explained in the Rochester Telephone case" [82 App. D.C. at 345, 164 F. 2d at 899].

It is submitted that Courts of Appeals have jurisdiction to review orders of general applicability issued by Respondent; that the orders under review have administrative finality with respect to Petitioner's contractual and other rights as discussed above; and that Petitioner is aggrieved by the orders.

For all the foregoing reasons and the reasons set forth in its petition for a writ of certiorari, Petitioner respectfully prays that its petition be granted.

Respectfully submitted,

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